

Supreme Court of the United States

October Term, 1942

No. 419

R. SIMPSON & CO., INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

**PETITION OF THE PETITIONER FOR REHEARING
OF APPLICATION FOR WRIT OF CERTIORARI
AND MOTION FOR LEAVE TO FILE OUT OF TIME,
WITH MEMORANDUM OF LAW THEREON.**

GERALD DONOVAN,
Counsel for Petitioner.

JAMES T. HEENEHAN,
FRANCIS F. STEVENS,
Of Counsel.

TABLE OF CONTENTS

	PAGE
Motion for Leave to File Petition for Rehearing	1
Petition for Rehearing of Application for Certiorari	3
Certificate of Counsel	6
Memorandum of Law	7

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R. SIMPSON & Co., Inc.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

MOTION OF PETITIONER FOR LEAVE TO FILE, OUT OF TIME, PETITION FOR REHEARING.

*To the Honorable Harlan Fiske Stone, Chief Justice, and
the Associated Justices of the Supreme Court of the
United States:*

COMES NOW, R. SIMPSON & Co., Inc., the petitioner in the above-entitled cause, and moves, by its attorney, GERALD DONOVAN, that leave be granted to file out of time the attached petition for rehearing of its application for certiorari in the above-entitled cause, and, in support of its motion, makes the following brief statement to this Honorable Court of the object of said motion and the facts on which it is based.

1. That on or about November 9, 1942, this Honorable Court denied the petition for certiorari herein.

2. That on or about February 10, 1943, a conflict of decisions on the same matter developed (as described in the annexed petition for rehearing) between the decision of the United States Circuit Court of Appeals for the Ninth

Circuit and the decision, herein, of the United States Circuit Court of Appeals for the Second Circuit.

3. That on or about March 22, 1943, the opinion of the Ninth Circuit in said case was withdrawn and another opinion substituted therefor.

4. That the aforesaid substituted opinion of the Ninth Circuit did not resolve the aforesaid conflict of decisions but, on the contrary, re-emphasized it.

5. That the reason this petition for rehearing was not sooner presented to this Honorable Court is that the aforesaid conflicting decision of the Ninth Circuit has not been, as yet, officially reported and petitioner has just recently become informed of its existence.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this motion for leave to file, out of time, the annexed petition for rehearing, be granted and that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit, directing that court to certify and send to this Honorable Court for its review and determination, on a day certain, therein to be named, a full and complete transcript of the record and all proceedings in this case, numbered and entitled on its docket "No. 147, R. Simpson & Co. v. Commissioner of Internal Revenue."

Respectfully submitted,

(Sgd.) GERALD DONOVAN,
Counsel for Petitioner.

JAMES T. HEENEHAN,
FRANCIS F. STEVENS,
Of Counsel.

Supreme Court of the United States

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PETITION FOR REHEARING.

*To the Honorable Harlan Fiske Stone, Chief Justice, and
the Associated Justices of the Supreme Court of the
United States:*

COMES NOW, R. SIMPSON & Co., Inc., the petitioner in the above-entitled cause, and presents by its attorney GERALD DONOVAN, its petition for a rehearing of its application for a writ of certiorari in the above-entitled cause, and, in support thereof, respectfully shows to this Honorable Court:

1. That on or about September 25, 1942, your petitioner filed its petition, in the above-entitled cause for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, together with its brief in support of said petition and the transcript of record.

2. That the principal contentions presented by said petition for certiorari were as follows:

(a) That the United States Circuit Court for the Second Circuit erred in holding herein that during the taxable

years in controversy (1934, 1935 and 1936) the petitioner, a corporation found herein by the United States Board of Tax Appeals to have been "actively engaged in the conduct of business with the general public in the operation of its pawnshops" (R. 27), and not found by the Board to have held the securities of, or otherwise to have controlled, any other corporation, person or organization, was a holding company within the meaning of Section 351 of the Revenue Acts of 1934 and 1936, respectively, or either of said acts.

(b) That said Circuit Court erred in holding that the application to petitioner of the aforesaid two statutes, or either of them, is not unconstitutional under the organic law of the United States of America.

(c) That said Circuit Court erred in holding that said statutes, or either of them, as applied to petitioner are not unconstitutional under the organic law of the United States of America.

(d) That said Circuit Court erred in holding that the filing by petitioner of its "complete income and excess-profit tax returns, Form 1120, for the taxable years" (R. 27), the filing by petitioner of "information returns, Form 1096, with the attached Form 1099 listing the amounts of dividends over \$300. paid to its stockholders, for the years in question" (R. 27) and the further fact that "petitioner's books and records, which gave some indication that more than 50 per cent of its stock was owned by less than five stockholders and disclosed that at least 80 per cent of its income was derived from interest, were at all times available to respondent and were actually made available to respondent's agents during audit of the income tax returns for the taxable years" (R. 27, 28), did not constitute in substance and effect the filing of Form 1120-H (personal holding company return) or the equivalent thereof, or did not,

at the very least, relieve petitioner from the imposition of penalties for failure to file said Form 1120-H.

3. That on or about November 9, 1942, this Honorable Court denied the aforesaid petition for a writ of certiorari.

4. That on or about February 10, 1943, a conflict of decisions on the same matter developed between United States circuit courts of appeals through the unanimous decision of the United States Circuit Court of Appeals for the Ninth Circuit in the case of *Lane-Wells Company v. Commissioner of Internal Revenue* (not yet officially reported) holding under substantially similar facts to those herein that (contrary to the decision of the Second Circuit, herein, as stated above) no penalties should be imposed for failure to file such Form 1120-H.

5. That on or about March 22, 1943, the opinion of the Ninth Circuit in said *Lane-Wells Co.* case was withdrawn and another opinion (denying the petition for rehearing of Commissioner of Internal Revenue) substituted therefor.

6. That the aforesaid substituted opinion of the Ninth Circuit did not modify, alter, or revoke said court's conclusion that penalties should not be imposed for failure to file Form 1120-H but, on the contrary, unanimously reaffirmed, after painstaking reconsideration, said court's original, unanimous decision to that effect.

7. That the reason this petition for rehearing was not sooner presented to this Honorable Court is that the aforesaid conflicting decision of the Ninth Circuit has not been, as yet, officially reported and petitioner has just recently become informed of its existence.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted, that a Writ of Certiorari be issued out of and under the seal

of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit, directing that court to certify and send to this Honorable Court for its review and determination, on a day certain therein to be named, a full and complete transcript of the record and all proceedings in this case, numbered and entitled on its docket "No. 147, R. Simpson & Co. v. Commissioner of Internal Revenue"; that said judgment of the United States Circuit Court of Appeals for the Second Circuit or, at the very least, that portion thereof which imposes a tax penalty, be reversed; and that this petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

May 28, 1943.

Respectfully submitted,

(Sgd.) GERALD DONOVAN,

Counsel for Petitioner.

JAMES T. HEENEHAN,

FRANCIS F. STEVENS,

Of Counsel.

Certificate of Counsel.

I, counsel for the above-named R. SIMPSON & Co. Inc., petitioner and movant, do hereby certify that both the foregoing petition for rehearing of petitioner's application for a writ of certiorari herein and the foregoing motion for leave to file, out of time, said petition for rehearing are presented in good faith, not for delay, and in the judgment of counsel, are well founded in law and fact.

(Sgd.) GERALD DONOVAN,

Counsel for R. Simpson & Co. Inc.,

Petitioner and Movant.

Supreme Court of the United States

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COMMISSIONER OF INTERNAL REVENUE.

MEMORANDUM OF LAW.

The Case of *Lane-Wells Co. v. Commissioner* (C. C. A. 9).

In the case of *Lane-Wells Company v. Commissioner of Internal Revenue* (C. C. A. 9 not yet officially reported. Earlier opinion of February 10, 1943 withdrawn and opinion of March 23, 1943 denying Commissioner rehearing substituted therefor) the taxpayer filed a timely income tax return (Form 1120) for the taxable years but failed to file the special return form (Form 1120H) required by regulation to be filed by personal holding companies. Because of such failure to file Form 1120H, the Government contended that deficiencies and penalties could be determined without reference to any limitation period.

The United States Circuit Court of Appeals for the Ninth Circuit, reversing a decision of the United States Board of Tax Appeals (43 B. T. A. 463; 45 B. T. A. 175), concluded that the return on Form 1120 revealed the neces-

sary facts upon which the Commissioner could have asserted the personal holding company tax and consequently such return started the running of the time within which the tax could be assessed, DENMAN, Circuit Judge, writing for a unanimous Court, saying in part:

"The petitioning corporations seek a review of a decision of the United States Board of Tax Appeals, now Tax Court of the United States, sustaining respondent's ((Commissioner of Internal Revenue)) determination of deficiencies and penalties on income surtax for the tax years 1934, 1935 and 1936 under the personal holding company income tax provisions of the Revenue Acts of 1934 and 1936.

A. The validity of the returns as affecting the time limiting statutes and penalties. The Board found that Technicraft, in good faith, claimed in its returns that it was not a personal holding company. It found further that the returns, filed in due time, showed all the facts necessary for the respondent to compute the taxes as a personal holding company obligation.

However, the incomes were returned on Form 1120 for taxing corporations not holding companies, instead of Form 1120H for taxing holding company corporations. The Commissioner also determined penalties of 25 percent. for each year on the theory that Technicraft had failed to file any returns and the penalties were upheld by the Board.

We do not agree that the returns are to be deemed not made.

We are unable to see any difference in principle between the Germantown decision ((309 U. S. 304, 307, 310, Feb. 26, 1940)) and the instant case, where one of the class of income taxpayers called 'holding companies' files, in good faith, a return on a form provided for companies not holding companies which

discloses the facts necessary to compute the tax due from the holding company.

* * * * *

Since, under the Germantown decision, the good faith return of all facts necessary to compute a tax is a 'return', though on a return for a different taxpayer, the Board erred in upholding the penalties determined by the Commissioner under Sec. 291 for the tax years 1934, 1935 and 1936."

The Court thus concludes that the return on Form 1120 revealed the necessary facts upon which the Commissioner could have asserted the personal holding company tax and consequently that the assertion of penalties for failure to file Form 1120H was in error.

Similarity of Cause at Bar to *Lane-Wells* Case.

In the case at bar as in the *Lane-Wells Co.* case, discussed immediately *supra*, the petitioning corporation ((R. Simpson & Co. Inc)) sought a review by a United States Circuit Court of Appeals ((Second Circuit)) of a decision of the United States Board of Tax Appeals, now Tax Court of the United States, sustaining respondent's ((Commissioner of Internal Revenue)) determination of deficiencies and *penalties* on income surtax for the tax years 1934, 1935 and 1936 under the personal holding company income tax provisions of the Revenue Acts of 1934 and 1936 (Record, pp. 33-42).

In the cause at bar, as in the *Lane-Wells Co.* case, the Board of Tax Appeals found that petitioner's claim, in its Form 1120 returns, that it was not a personal holding company, was made in good faith:

"He did not file personal holding company returns on behalf of petitioner for the taxable years

because he thought petitioner was not a personal holding company within the meaning of Section 351" (Record, p. 28).

" . . . petitioner's failure to file was due entirely to its erroneous impression that it was not one. This . . . requires approval of respondent's imposition of the penalty, *Lanes-Wells Co.*, 43 B. T. A. 463 . . . " (Record, p. 30).

(It is thus also apparent that the Board in the cause at bar relied on its prior decision in the *Lane-Wells* case, now reversed by the United States Circuit Court of Appeals for the Ninth Circuit.)

Likewise, as in the Circuit Court *Lane-Wells* case, the Board found that the returns filed in due time, showed all the facts necessary for the respondent Commissioner to compute the taxes as a personal holding company obligation:

"On or before the due dates petitioner filed its complete income and excess profits tax returns, Form 1120, for the taxable years. . . . Petitioner also filed information returns, Form 1096, with the attached Form 1099 listing the amounts of dividends over \$300 paid to its stockholders, for the years in question. Petitioner's books and records, which gave some indication that more than 50 per cent of its stock was owned by less than five stockholders and disclosed that at least 80 per cent of its income was derived from interest, were at all times available to respondent and were actually made available to respondent's agents during audit of the income tax returns for the taxable years" (Record, pp. 27-28).

As in the *Lane-Wells* case, the incomes, in the cause at bar, were returned on Form 1120 instead of Form 1120H and the Commissioner also determined penalties of 25 per cent for each year on the theory that the petitioner had

failed to file any returns, and the penalties were upheld by the Board:

"Respondent * * * added 25 per cent penalties for failure to file personal holding company returns" (Record, p. 25).

"Petitioner did not file personal holding company returns, Form 1120-H, for the taxable years" (Record, p. 28).

"The penalty for failing to file a personal holding company return is mandatory for the years 1934 and 1935, since no return was ever filed. * * * This requires approval of respondent's imposition of the penalty, *Lane-Wells Co.*, 43 B. T. A. 463, without the necessity of passing upon petitioner's contention that under the wording of the 1936 Act a showing of reasonable cause entitled the taxpayer to a remission of the imposition in spite of the complete absence of even a delinquent filing" (Record, p. 30).

It thus clearly appears that a conflict of decisions exists between two circuit courts of appeals, and it is respectfully submitted that the petition for rehearing herein should be granted and a writ of certiorari issued.

Respectfully submitted,

GERALD DONOVAN,
Counsel for Petitioner.

JAMES T. HEENEHAN,
FRANCIS F. STEVENS,
Of Counsel.